



British Institute of
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Economic crimes in investor-state disputes

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Prof Yarik Kryvoi

Senior Research Fellow in
International Economic Law

Director, Investment Treaty Forum

y.kryvoi@biicl.org



Outline

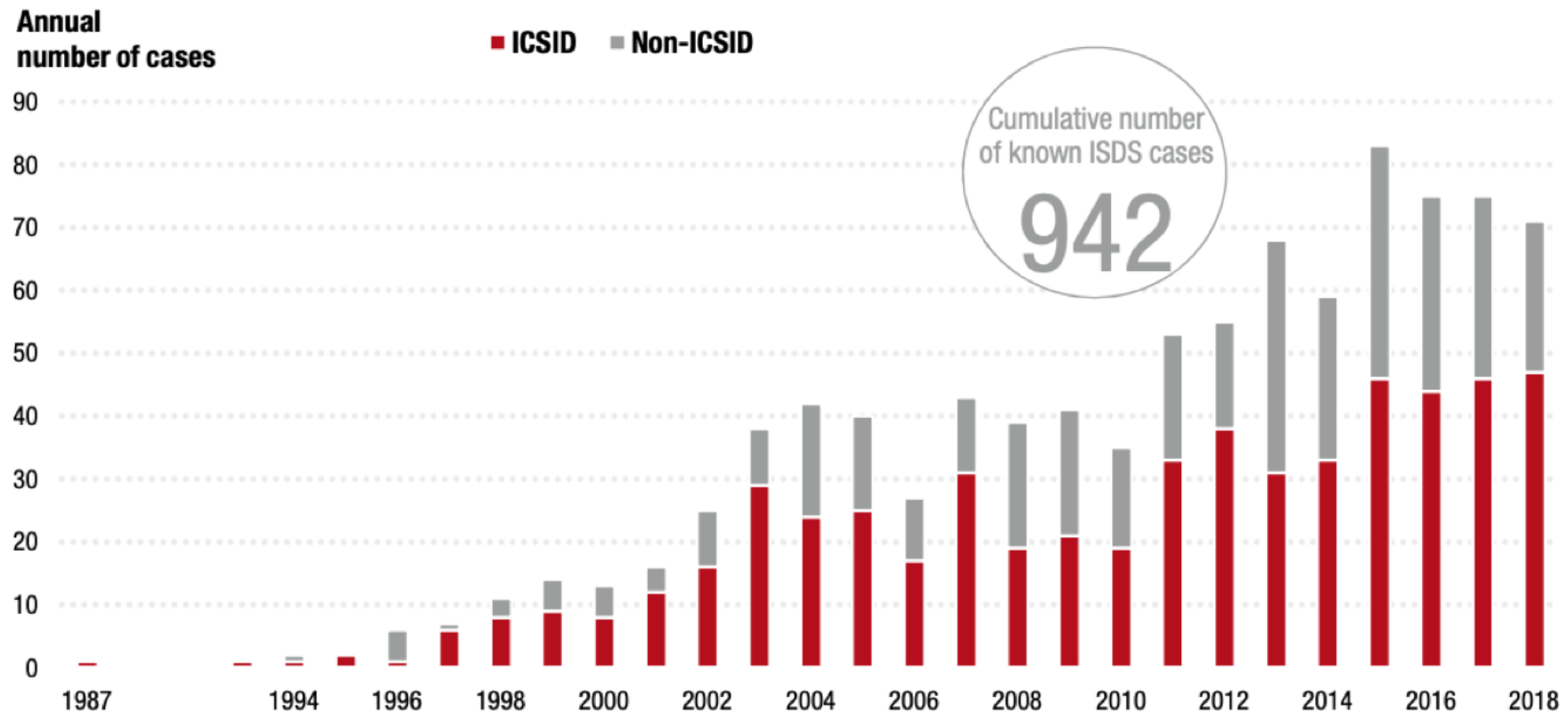
- Introduction
- Investor-State disputes
- Types of economic crimes
- The effect on investor-state disputes
- Jurisdiction/Admissibility
- Standards of review

Investor-State disputes

- **Private** cause of action against the **states** (no sovereign immunity, no need to invoke diplomatic protections)
- **Review** of conduct of public authorities (regulators, adjudicators, enforcers)
- **Remedies** in the form of damages to the investor, share in costs of proceedings or even a “recommendation” to make a payment to a UN anti-corruption agency

Growth of investor-State disputes

Figure 1. Trends in known treaty-based ISDS cases, 1987–2018



Source: UNCTAD, ISDS Navigator.

Types of economic crimes

The types of economic crimes which arise in investor–State disputes include:

- bribery and corruption
- tax evasion
- bank, accounting and securities fraud
- fake asset sales
- intentional selling of overpriced goods and reimbursement scams

Issues may arise out of economic crimes in ISDS

- Jurisdiction and admissibility
- Provisional measures
- Merits of the dispute
- Enforcement of awards

World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, 4 October 2006



- Claimant alleged Kenya violated various contractual obligations and international law by illegally taking and destroying Claimant's property
- The Claimant filed a document in the arbitral proceedings that revealed the Claimant previously had made a covert payment to the former President of Kenya, Daniel arap Moi, in order to conclude the 1989 Agreement.
- Tribunal: the Claimant had no right to pursue or recover under any of its pleaded claims, all of which arose from that 1989 Agreement (para. 179).

Complexity of economic crimes in ISDS

- The State is a **party to arbitration**, but also **regulates, enforces laws, adjudicates** and **investigates** crimes on its territory.
- In addition, State representatives may also be **involved in committing economic crimes** relevant to the disputes.
- Allegations of economic crimes raise complex questions on the border of **public and private law**, including whether investor-state tribunals have jurisdiction if the underlying investment was **acquired by illegal means**.
- How far the tribunals should go in examining allegations of economic crimes and whether the limits lie to their **deference** to actions of domestic courts?

Economic crimes in investor-State disputes

- Criminal business enterprises may use **sophisticated corporate structure** with multiple layers of entities in various jurisdictions to mix legal and illegal funds.
- States argue committing economic crimes leads to illegal investments **not qualifying for treaty protection**.
- Economic crimes or their proceeds can also be hidden in **consent awards** rendered in international arbitration
- Criminal proceedings can also be set in motion only **as a defensive measure** (e.g., to escape jurisdiction or as retaliation) and illegality may be unearthed only when a claim is asserted against the State
- Liability of the State arises if rights under a certain protected principles are breached (denial of Justice, FET, expropriation)

Economic crimes as a PIL matter

- States have the right to regulate
- Investors have their legitimate expectations
- The role of law and dispute resolution to reconcile conflicting interests
- Relevant standards (indirect expropriation, denial of justice, breach of the fair and equitable treatment standard, etc)

Jurisdiction and admissibility

- Why important to distinguish between jurisdiction or/and admissibility? Occurs **after the establishment of investment** or before it?
- At the same time, since both **host states and investors are often involved in economic crimes.**
- Tribunal's **decision may vary from claim's dismissal, liability of the state** (i.e. for denial of justice), to ordering the Host State **to contribute to costs** or even **to pay a donation to UN anti-corruption fund.**

Merits or jurisdiction?

- If arose at the stage of acquiring an investment in a host State - the question of jurisdiction
- If arose at the stage of acquiring an investment in a host State - merits
- If the relevant treaty is silent on the issue of the investment's legality - merits
- Illegality does not necessarily mean rejection of the claim

Separability principle

- The arbitration agreement will be invalid, leaving the tribunal without jurisdiction, only if the agreement itself has a fundamental defect
- How can it apply to economic crimes?

The standard of review

- Full deference
- No deference (new trial)
- Tribunals do not function as courts of final review over a host State's criminal justice system
- Example: in *Tokios Tokelés v Ukraine*, the tribunal did not find a denial of justice in a situation where criminal charges for tax evasion were discontinued, then twice revived and remained pending three years after the alleged misconduct.

Different types of corruption

Distinction between

- Petty corruption
- Grand corruption
- Political corruption

Yukos Universal Limited (Isle of Man) v The Russian Federation, PCA, UNCITRAL, Award, 18 July 2014



AP / Sergei Loiko

- Facts of the case
- The tribunal took account the investor's tax evasion schemes and apportioned responsibility the between the investor (25 per cent) and the State (75 per cent)

Domestic criminal procedures and provisional measures

- ICSID tribunals have the power to recommend provisional measures to preserve the respective rights of the parties
- Exclusivity of ICSID proceedings
- Necessary, urgent and meant to protect certain existing rights
- Ordered the stay of criminal proceedings for the purpose of preserving important evidence, suspension of proceedings relating to money laundering, etc
- *Quiborax v Bolivia*: the tribunal concluded that the initiation of criminal proceedings for alleged forgery amounted to a 'defence strategy'

Enforcement of provisional measures

- Enforcement issues under the ICSID convention
- Enforcement issues under the NY Convention
- Tribunals may factor non-compliance with these measures into the calculation of damages

Evidentiary challenges

- Domestic law issue
- “Reasonable certainty”
- “Clear and convincing evidence”
- If the state with its resources and powers fails to prove allegations of money laundering in their **domestic courts**, tribunals are sceptical about considering such obligations in international arbitration
- Tribunals ordered **provisional measures** to stay criminal proceeding of economic crimes as provisional measures to prevents its influence on the arbitral proceedings

Misconduct of the State representatives

- The State's arguments on illegality of the investment may also be rejected because State representatives were **involved in or relied on the misconduct** in question.
- If the State was aware, knowingly overlooked and endorsed an investment, breaching its law, fairness would require that the government will **be estopped** from raising it as a jurisdictional defence.

Attribution of the conduct of officials

- ‘The conduct of private persons is not as such attributable to the State’
- But the ILC Articles on State Responsibility regulate situations of excess of authority or contravention of instructions:

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, 8 March 2017



- “(a) did Claimants make an overpayment as a part of the purchase price; and (b) was that overpayment made to Ms Karimova? ... (c) was Ms Karimova an ‘official’ of the Government and (d) was the overpayment intended ‘for performance or nonperformance of certain action, which the official must or could have officially performed, in the interests of the person giving a bribe’?”
- Tribunal does conclude that President’s daughter was recipient of any alleged overpayment
- Although Ms Karimova was intended target of the alleged overpayment, corruption under Uzbek law not proven as she had no official role at the time

Test proposed in Kim v Uzbekistan

- The importance of the law allegedly breached
- The seriousness of the alleged breach
- Whether the combination of these two elements would compromise a significant interest of the host State and, justify the harshness of moving the investment outside the BIT protection as a proportionate consequence.

Requirement to prosecute

- Tribunals usually do not link exercising jurisdiction to the **requirement to prosecute** the State representative for the committed crime although one tribunal suggested it.
- This is despite that fact that States are **under an obligation to combat financial crime**, bribery and some other economic crimes under international law

Future of Investor-state arbitration

- Several countries, such as Ecuador, Venezuela and Bolivia, decided to **withdraw** from the International Centre for Settlement of Investment Disputes (ICSID) Convention which allows the resolution of disputes between foreign investors and States.
- Investment treaties as well as trade treaties will provide for the States' rights to **pursue public policy objectives**. (CETA: “to achieve legitimate policy objectives, such as the protection of public health, safety, the environment, public morals, social and consumer protection.”)

International consensus without details

- Despite the apparent **consensus** on international level that crimes such as corruption, bribery, money laundering, international regulations often lack either the **necessary detail** or the **binding force**.
- This means that international tribunals often rely on **national law** and their **own understanding** of the effect of economic crimes on investor-state disputes.

Future trends

- **Referencing global standards** in international investment agreements, including those related to bribery and money laundering (UNCTAD)
- More deference to the State **right to regulate**, particularly in areas which come close to public policy issues, health and environment
- New ways of **resolving international disputes**, for example under the the Comprehensive Economic and Trade Agreement (CETA)
- Somewhat more **legal certainty** when it comes to reviewing actions of domestic courts and regulators.

Additional sources

- Y. Kryvoi, '[Economic Crimes in International Investment Law](#)', *International and Comparative Law Quarterly*, Volume 67, Issue 3, pp. 577-605 (2018)
- Y. Kryvoi, [International Centre for Settlement of Investment Disputes](#) (2016, new edition forthcoming, 2019)